Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

WILLIAM DUNCAN,

Petitioner,

v.

DELTA AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Eleventh Circuit applied the correct standard under Rule 56(f) of the Federal Rules of Civil Procedure when ruling that the District Court did not abuse its discretion when it made no finding regarding Petitioner's Rule 56(f) application and denying it as moot when it granted respondent's summary judgment motion.

Whether the Court erred when affirming the granting of summary judgment when the reasons for the termination were in dispute and when developed in the record were similar incidents occurring which did not result in any discipline to similarly situated employees.

PARTIES TO THE PROCEEDINGS

Petitioner William Duncan was employed at the Respondent as a pilot (Captain) at the Miami International Airport. He was the plaintiff in the district court and appellant in the Eleventh Circuit Court of Appeals.

Respondent Delta Airlines Inc. was the defendant in the district court and appellee in the Eleventh Circuit Court of Appeals.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eleventh Circuit (App. A) is an unreported judgment and opinion to wit *William Duncan v. Delta Airlines Inc.*, Case No. 00-12939. The district court (App. B) opinion and judgment is unreported to wit: *William Duncan v. Delta Airlines Inc.*, Case No. 99-6428-CIV-FERGUSON.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on October 25, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves Rule 56(f) of the Federal Rules of Civil Procedure which states:

> **(f) When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to be obtained or depositions to be taken or discovery to be had or may make such other orders as is just.

This case also involves the Florida Civil Rights Act of 1992, Florida Statute 760.10 (patterned after Title VII)

> It shall be an unlawful for an employer
>
> > (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment, because of such individuals's age . . . handicap.

STATEMENT OF THE CASE

This action was commenced by Petitioner Duncan alleging that he was terminated due to his age, disability and perceived disability. The complaint filed by the Petitioner alleged a cause of action for deprivation of employment opportunities in violation of the Florida Civil Rights Act of 1992, Florida Statute 760, *et seq.* only. App. B at 15a. Captain Duncan alleges that there was an age bias, particularly from Chief Pilot Burnfeld who built a case of progressive discipline against Captain Duncan which ultimately caused his termination regarding an alleged improper taxing incident App. B at 15a.

In one of several memorandum placed in Petitioner's personnel file without his knowledge, Chief Pilot Burnfield stated that some crews preferred not to fly with Captain Duncan. But when questioned at his deposition, he had no recollection of which crews did not want to fly with him. Finally, the memorandum dated April 16, 1996 by Burnfeld reflects an open age bias when he states **"HOPEFULLY THIS PROBLEM WILL BE RESOLVED, BUT WE HAVE A DINOSAUR ATTITUDE OF RESISTANCE TO CHANGE AND**

FURTHER INCIDENTS WILL REQUIRE MORE SUBSTANTIAL ACTION." This memorandum was placed in Petitioner's file contrary to the agreement that was reached that nothing was done wrong and that there would be nothing placed in his personnel file and directly contrary to the CBA and personnel rules and regulations of Delta since one is suppose to receive a copy of any counseling and be signed by the pilot before it goes in his file. App. A at 7a.

Delta, through Burnfield again seized on any opportunity to discredit Captain Duncan in an attempt to set him up for termination due to his age when a second officer complained about Duncan. However, no credible investigation whatsoever was done and apparently took the word of a second officer who had almost no experience on a 727, who had recently returned from furlough, and who felt that he was more qualified to make critical decisions than himself or his experienced first officer. Burnfield never took a detailed statement from Captain Duncan nor first officer, Greg Knox. In fact, he never showed him a copy of the complaint, nor did Burnfield advise him of the specific allegations against him. Burnfield could not answer why he did not interview the co-pilot who was also accompanying Thompson and Duncan even though it is the better practice to interview all significant witnesses when suspending someone for thirty days on alleged serious safety issues. He did not recall his conversation with Duncan but concluded that Thompson's complaint was accurate In fact, when First Officer Knox was contacted by telephone and indicated that nothing improper occurred, Delta decided not to take a statement from Knox knowing that it would not support a suspension. This was the first significant adverse employment action (progressive discipline) taken in which Burnfeld was the decision maker App. A at 3a.

The suspension which was baseless was not grieved since he was threatened with further pay loss and loss of health insurance during the suspension and was intimated by a direct threat of further financial hardship.

Delta once again suspended him for thirty days over baseless charges and even went as far as instigating a passenger to complain about him. The circumstances regarding this incident which caused his suspension is as follows. Captain Duncan was dead heading from Dallas to Cincinnati aboard flight 1922. He did not have an altercation with a passenger and in fact the passenger never complained to anyone.

In a further attempt to build mountain out of a mole hill, Delta took the unprecedented step of calling the passenger to instigate a complaint since the passenger had never complained. The only thing he did was move a small attache case from the overhead compartment to an adjoining compartment. The passenger asked Petitioner "what are you doing" and he replied only trying to make room for my bag. No other conversation took place between Captain Duncan and the passenger. The only other thing that occurred on the flight was when the flight attendant approached Captain Duncan and a member of his crew and stated "they do not have enough snacks for you" he replied in a joking manner "oh well, I guess we have to go by seniority".) Subsequently, the Captain Sultzbach (approximately 40 years old at the time) of the flight asked to speak to Captain Duncan and approached him in an aggressive and threatening manner as witnessed by members of his crew. Captain Duncan received a suspension notice of thirty days over this incident which is a shocking and grossly disproportionate penalty. It should be noted that Captain Duncan instigated the investigation

when he along with his crew went into see Captain Tutt and prepared CIOR (crew irregularity operational report) in connection with the unprofessional behavior exhibited by the Captain of that flight. Delta seized the opportunity to turn the situation around (and favor a Captain who was approximately 40 years old) despite the unrebutted statements made by members of his crew regarding the aggressive and threatening manor in which this substantially younger Captain approached him. Nothing was done to Captain Sultzbach but Captain Duncan was once again singled out for discriminatory treatment due to his age over a non existent incident and key witnesses which supported Duncan were not contacted. Captain Duncan was advised that Delta, through Shand Gause, System Manager, that he would seek a sixty day suspension if he contested the validity of the suspension. This would have been a substantial loss of income without insurance and thus he decided that he could not afford to grieve the thirty day suspension. (App. A at 3a)

In connection with the final incident at La Guardia Airport, (LGA), Captain Duncan departing from LGA on March 21, 1998 at approximately 6:30 P.M. and the weather conditions was overcast and drizzling. (R1-43-7-9) The aircraft was in the process of being pushed back to an area known as spot 29 which is approximately one hundred yards from the gate. All pre-start check lists had been completed and the plane was cleared to start the number two engine while the aircraft was in the process of being pushed backward from the alley way to spot 29. By the time the aircraft was positioned at spot 29 by the ground crew, the number two engine was still in the process of being started. At this point Captain Duncan was advised "brakes set" from the ground crew. He replied, "brakes set, clear to disconnect".

At this point, the ground person immediately pulled the headset jack used for communication thereby making any further oral communications impossible.

The ground crew personnel never advised Captain Duncan to stand by for hand signals which is part of Delta's procedures before breaking off communications with him. Captain Duncan then looked ninety degrees to his left and saw the marshaling agent (who is one of the ground crew personnel) with his wands at a forty-five degree position meaning the aircraft was suppose to be in a stopped position with the brakes set which the aircraft was at that point. The proper procedure is that the agent should have been at 10:00 to 12:00 position and thus in plain view of both the Captain and First Officer. Instead the agent positioned himself at 9:00 or ninety degrees directly to the left of the Captain making it impossible for anyone but the Captain to see him. At that point, he finished monitoring the start of the number two engine which had now come up to idle, the start being completed.

He then called for the number one engine to be started and looked to his left and observed a salute from the marshaling agent, returned his salute and he then disappeared from view as was the Delta procedure. Captain Duncan asked the first officer, Doug Schalfer for taxi clearance and turned the taxi lights on and started a very slow roll with just the number two engine at idle power. (The number one engine had just started rotation and was not close to being minimum rotation speed to engage the fuel to start the engine.) At that time, Captain Duncan observed the marshaling agent again ninety degrees to his left waiving a stop and other unknown signs with his wands. He immediately stopped the aircraft, and called operations to find out the problem. Immediately

his first officer terminated the number one engine. Operations advised Captain Duncan that ground crew personnel were not clear of aircraft at the time he started to taxi.

It should be noted that the first officer is also responsible for making sure the aircraft is clear and if the Delta's version is believed that the marshaling agent was in front of the aircraft, he would have been in plain view of the first officer, Doug Schalfer. The first officer at that time was approximately forty years old and did not even receive a suspension, or even a counseling at the time for the incident which resulted in Captain Duncan's termination. It should be noted that Captain Duncan has flown literally thousands of flights without incident as well as his co-pilot who was a highly experienced and knowledgeable pilot who would never taxi if he was not certain that the plane was clear to do so. Subsequently, Captain Duncan was verbally suspended with pay. (App. A at 3a) While Captain Duncan was suspended, he decided to have his required FAA physical. On April 7, 1998, he went to Dr. Perraud, his FAA examiner to renew his first class medical certificate which is required every six months. However, Captain Duncan was advised by Dr. Perraud that he could not give him medical clearance because he was now suffering from diabetes and high blood pressure. As a result, he faxed a copy of the medical turn down to Captain Columbia on April 8, 1998 who in turn faxed it to Shand Gause. He was advised by Captain Columbia that Delta's position was that if he attempted to go out on medical disability leave, that Delta would terminate him. Because of the severe financial consequences resulting from a termination, he had no choice and was forced to take an early retirement thus resulted in a substantial financial loss of pension benefits. Problems regarding the ground crews have reoccurred repeatedly. The problem of taxing before getting the salute occurred in New York. Captain Quiello stated that the pilots did not wait

for the marshaling agent's salute before taxing which means the area such as the tug etc. may not yet be clear and thus you wait for the salute. It is the Captain' responsibility to make sure the salute is given by the marshaling agent prior to taxing. At JFK, there were at least three incidents admitted (maybe more) where the pilots did not obtain the salute from the marshaling agent which resulted in having improper push backs. (App. A at 3a) This argument was not addressed by either court although developed in the record.

The exact same situation which occurred to Captain Duncan. However, none of the pilots involved in these incidents received any discipline. In fact, there was a safety bulletin on this very point and a subsequent memorandum by Quiello acknowledging this reoccurring problem in New York. However, in an extraordinary memory lapse, Quiello could not recollect the name of one person on one of the crew regarding at least three occurrences (probably more) of the crew not adhering to push back procedures. Further, none of the incidents resulted in any formal counseling at all let alone a termination. What is even more remarkable is that when an incident of this nature has occurred a CIOR has to be prepared by the flight crew and the ground crew. However, despite the requests for information, Delta stated that it had no such documents in its possession, although Captain Duncan and member of his crew followed Delta procedures and prepared a CIOR. (App. A at 3a) This argument was not addressed by either court although developed in the record.

In addition, there was another accident at LGA involving a 727 push back with Captain Richard Knowski (approximately forty years old) which took place in November or December, 1999. However, no disciplinary action whatsoever was taken against this substantially younger pilot even though there was

substantial damage to the aircraft and no action taken against the ground crew. Since the accident occurred in November, 1999, discovery concluded in December, 1999, and petitioner's 56(f) application was denied, a deposition could not be obtained.

A. Proceeding Below

This action was commenced on March 16, 1999 in State Court for age and disability discrimination in connection with plaintiff's termination as a Delta pilot and was removed in April, 1999 to the United States District Court for the Southern District of Florida. There was extensive motion practice early in the case such as a motion to dismiss and a motion to remand. The Court denied the motion to remand and granted the motion to dismiss as to the individual defendant. Also, a pretrial status conference was held in May, 1999 setting the discovery deadline of November 22, 1999 which was extended to December 22, 1999 by order dated December 28, 1999. It should be noted due to the vacation schedules and location of the witnesses and difficulty in serving process since they are pilots frequently traveling especially during Christmas, Petitioner-Duncan had filed a Rule 56(f) motion and an extension motion requesting that the discovery deadline be extended to January 22, 2000. These motions were denied as moot when the District Court below ruled on the summary judgment. (App. A at 5a)

The reason it was necessary for the extension was that Plaintiff had served their initial discovery requests which have been responded too. In addition, plaintiff's deposition was conducted. Although the discovery has been responded to, the adequacy of the responses by defendant were at issue. After negotiations, it was settled that initially the crew irregularity reports be produced for inspection. However, there were

approximately thirteen thousand crew irregularity report located in Atlanta Georgia that was made available around November 15, 1999. The document production request was on July 14, 1999. Because of the volume of the crew irregularity reports, plaintiff narrowed its request to only one category. In addition, once the documents were inspected and copied, there would have been several more depositions conducted regarding similarly situated pilots. This information was critical since it provided the comparatives to Captain Duncan. However, the proposal to the narrow the request although made within the discovery period fell on deaf ears.

In addition, the depositions of the witnesses was difficult since most of the depositions were out of the state of Florida in various States. Also, most of the witnesses are pilots and thus are difficult to get a hold off and schedule since their job obviously has them traveling particularly during December. It should be noted that five depositions have been taken by Duncan. Duncan had scheduled other depositions which had to be continued since Petitioner's counsel was actually engaged in Court proceedings. But key witnesses agreed to the subsequently appear but because of vacation schedules and their work schedules, the depositions could not be conducted before the discovery deadline. The case was far more complex than Petitioner anticipated since the records and witnesses were located out of State and were voluminous. To obtain record regarding these types of incidents and similar incidents regarding pilot error is difficult since there are literally thousands of pilots who are based out of Atlanta. Thus, this case was far more complicated that originally contemplated at the initial pretrial status conference. (App. at 5a) This argument although developed in the record below was not addressed by either court below.

The Summary Judgment was granted due to Court ruling that Petitioner failed to offer evidence which raises material issues of fact giving rise to an inference of discrimination or in the alternative that the legitimate reasons articulated by defendant were not shown to be pre-textual in that there was no evidence in the record that Petitioner was treated disparately in connection with his termination. In addition, the lower Court never ruled (it was denied as moot when the court ruled on the summary judgment) upon plaintiff's 56(f) motion, motion for an extension of discovery and motion for a one week extension to submit opposition papers to the summary judgment. (App. A at 10a)

The Court of Appeals adopted the district's court's opinion and affirmed the district's court judgment, App. A at __, and also held that the District Court did not abuse its discretion in denying plaintiff's Rule 56(f) motion because plaintiff had failed to demonstrate how the additional discovery would aid Duncan and that there was ample time to complete discovery. (App. A at 10a)

REASONS FOR GRANTING WRIT

I.

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF THE SUPREME COURT AND WITH OTHER CIRCUITS

A. The Rule 56(f) Motion Was Improperly Denied

In the case at bar, the court below committed reversible error by not allowing Captain Duncan an opportunity to complete discovery or at least supplement the record below. In fact, the District Court below clearly abused its discretion when it granted defendant's motion for summary judgment but denied as moot plaintiff's Rule 56(f) motion without determining the merits of the 56(f) motion at all. A rule 56(f) motion should be liberally construed unless the motion is dilatory or lacking merit. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968); *Buchanan v. Starships Inc.*, 744 F.2d 1070 (5th Cir. 1984). In fact it is considered an abuse of discretion if the record below is incomplete. *Visa Int'l Service Ass'n v. Bankcard Holders of America*, 784 F.2d 1472 (9th Cir. 1986). In short, Rule 56(f) may be utilized by the opposing party to state reasons why one has not had sufficient time in which to utilize discovery procedures. If those reasons appear reasonable, then the motion for summary judgment should be denied. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The Rule provides an additional safeguard against an improvident or premature grant of summary judgment. Courts have held that continuances would be proper when the Court concluded that the party opposing summary judgment had been diligent and

had acted in good faith. *Miller v. Beneficial Management Corp.*, 977 F.2d 834 (3d Cir. 1992). Sufficient time for discovery is especially important when the relevant facts are exclusively in control of the opposing party because only one party has had an opportunity to present their side of the case. *Schoembaum v. Firstbrook*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1968). In addition, the granting of continuances is more appropriate because extracting information from an opposing party who is the sole source of that information may be a more difficult process than obtaining information from an disinterested source. In *International Shortstop Inc. v. Rally Inc.*, 939 F.2d 1257 (5th Cir. 1991), the court held that even though plaintiff had several extensions of discovery, the delay was attributable to defendant and thus the 56(f) application should have been granted.

The case at bar which had been pending in State Court (the action was a state claim only) first was removed in April, 1999. Motion practice ensued including a motion to dismiss and motion for remand. The first status conference was held in May, 1999 and the discovery deadline was set for November 22, 1999. However, the case was far more complex than originally contemplated due to the fact that all of the witnesses and documents are located out of state. In fact the witnesses are all pilots, were difficult to serve since they are constantly traveling and due to their schedules were extremely difficult to set particularly from Thanksgiving to the New Year. During the six to seven months that discovery has been open, plaintiff has sent a first set of interrogatories, a second set of interrogatories, a first request for document production and a second request for document production. In addition, plaintiff has taken the deposition of five witnesses. Captain Duncan also has been

deposed and responded to interrogatories and document production request. Thus, plaintiff has not sat idly by but a great deal of activity had taken place.

Delta argues that Captain Duncan has not shown a need for the additional discovery. However, the witnesses which were identified are important. For example, Captain Columbia was the union representative at the time of plaintiff's termination and will verify that plaintiff was only threatened with termination after they found about his disability. Another witness, Richard Schaefler was plaintiff's copilot at the time of the incident which led to his termination. Moreover, the documents requested were also critical since the documentation requested was for pilots who reported the same incidents which led to plaintiff's termination. Although the defendants, after negotiation made available the crew irregularity reports in November, 1999 (the document production request was made on July 14, 1999; thus taking four months before making the document available) since there were well over thirteen thousand reports, Captain Duncan narrowed his request to just one category, improper taxing, but Captain Duncan did not received a response back from Delta. Plaintiff has shown a need for the additional discovery, and diligence in pursuing the relevant information. Further to inspect thirteen thousand documents which were located out of state (these documents were incident reports of improper taxing and other crew irregularities), and then subpoena the potential witnesses who are pilots constantly traveling for deposition and out of state within approximately a month was not possible.

B. The Eleventh Circuit Failed to Follow Reeves

In reviewing the granting of summary judgment, the Court must view the evidence in a light most favorable to the plaintiff. *Sweat v. Miller Brewing Company*, 708 F.2d 655 (11th Cir. 1983). A review of the record below reflects that Delta built a case for his termination based upon progressive disciplinary action. However, the three primary incidents (two suspensions and the termination incident) are in dispute as well as the minor incidents preceding Petitioner's suspensions and termination. As a result, if there is a factual dispute in the record, the finder of fact can find discrimination although it does not have to do so making summary judgment inappropriate, *Reeves v. Sanderson Plumbing Products Inc.*, 120 S. Ct. 2097 (2000).

Also, developed in the record below was a statement by a decision maker regarding the first suspension when in the memorandum he reflected an open age bias against Duncan when he stated:

> HOPEFULLY THIS PROBLEM WILL BE RESOLVED, BUT WE HAVE A DINOSAUR ATTITUDE OF RESISTANCE TO CHANGE AND FURTHER INCIDENTS WILL REQUIRE MORE SUBSTANTIAL ACTION.

Problems regarding improper taxing by other pilots have reoccurred repeatedly was developed in the record without any discipline but entirely ignored by the courts below.

In addition, there was another accident at LGA involving a 727 push back with Captain Richard Knowski (approximately forty years old) which took place in November or December,

1999. However, no disciplinary action was taken against this substantially younger pilot even though there was substantial damage to the aircraft. Because this occurred at the close of discovery and Rule 56(f) Motion was denied, the deposition of Captain Knowski could not be arranged.

In any event, Captain Duncan was suspended. While he was suspended, Captain Duncan decided to have his required FAA physical. On April 7, 1998, he went to Dr. Perraud, his FAA examiner to renew his first class medical certificate which is required every six months. He was advised by Dr. Perraud that he could not get his medical clearance because he was now suffering from diabetes and high blood pressure. As a result, he faxed a copy of the medical turn down to Captain Columbia on April 8, 1998 who in turn faxed it to Shand Gause. Captain Duncan was advised by Captain Columbia that Delta's position was that if he attempted to go out on medical disability leave, that Delta would terminate him. Captain Columbia's deposition was not taken because the Rule 56(f) was denied. This was another error committed by the court below. (App. A at 10a)

II.

THE QUESTIONS PRESENTED ARE IMPORTANT AND THERE IS A CONFLICT IN THE CIRCUITS

The questions presented are important. Further clarification regarding the circumstances of when a Rule 56(f) motion should be granted would enable the courts below to apply a uniform standard of when to allow a continuance for additional discovery when a case dispositive summary judgment motion is made. The Eleventh Circuit appears to follow a very narrow standard, a substantial harm standard to party moving for the continuance instead of

liberally construing Rule 56(f) to insure that the record is complete as most other circuits do. *Carmical Bell Helicopter Textron Inc.*, 117 F.3d 490 (11th Cir. 1997); *Florida Power & Light v. Allis Chalmers Corp.*, 893 F.2d 1813 (11th Cir. 1990).

III.

THE DECISION OF THE COURT OF APPEALS HAS A PARTICULARLY DEBILITATING EFFECT ON EMPLOYEES

The Eleventh Circuit standard regarding a Rule 56(f) motion has a particularly debilitating effect on employees since the employer generally possesses exclusive knowledge of the documents and is control of the witnesses. In sum, the respondent should not be able to wait four months to produce documents in a six month discovery period and then require the plaintiff to inspect over thirteen thousand documents out of state. (Duncan attempted to narrow his request but there was no response by Delta) After Petitioner inspected and copied the documents and further investigated any incidents regarding improper taxing and he would then have to schedule the depositions of pilots, all of whom are located out of state within a one month time table during the busiest time of the year for air travel is not reasonable and thus the courts below erred in denying the Rule 56(f) motion.[1]

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1. It should be noted that there has been at least 15 summary judgment motions granted in favor of Delta which many were subsequently affirmed by the Eleventh Circuit concerning employment cases under Title VII, ADA and ADEA. Put simply, not one summary judgment was reversed by the Eleventh Circuit. *See Sallas v. Delta Airlines*, 94 CIV 1012; *Thompson v. Delta* (Cont'd)

CONCLUSION

For the reasons set for above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED OCTOBER 25, 2000

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-12939
Non-Argument Calendar

D. C. Docket No. 99-06428-CV-WDF

WILLIAM DUNCAN,

Plaintiff-Appellant,

versus

DELTA AIR LINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(October 25, 2000)

Before CARNES, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant appeals the granting of Defendant-Appellee's motion for summary judgment. Because the

district court correctly found that there was no genuine issue as to any material fact and that Defendant was entitled to judgment as a matter of law, we affirm.

I. BACKGROUND

Northeast Airlines hired Plaintiff William Duncan (Duncan) as a flight engineer in 1967. In 1972, Northeast merged with Defendant Delta Air Lines, Inc. (Delta), and Duncan progressed through Delta's pilot ranks, eventually attaining the position of captain in 1987.

In 1993, Duncan received a disciplinary letter for failing to appear to fly a series of trips assigned to him. This letter was the first of several disciplinary reprimands for violating safety procedures and for unprofessional behavior that led to Delta's decision to terminate Duncan's employment. In 1994, a Delta supervisor received a telephone call from another pilot reporting that Duncan failed to operate his aircraft in accordance with standard operating procedures and that he acted unprofessionally towards other crew members. In response to the call, Delta administered a "line check" of a revenue flight Duncan commanded.[1]

In 1996, Duncan allegedly engaged in unprofessional social conduct while on a layover. Duncan requested that a van driver radio the hotel and order a round of drinks for the crew, as the hotel bar closed before the crew normally arrived. When the drinks were not available, Duncan became

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1. A "line check" is an evaluation of a pilot's flying skills, normally administered to Delta captains bi-annually.

irate in the hotel lobby while in uniform. Later that year, another crew member registered a complaint against Duncan concerning his failure to abide by Delta's standard operating procedure. Delta's chief pilot, Captain Chuck Burnfield, counseled Duncan regarding these incidents.

Later in 1996, Burnfield received a letter from Second Officer Paul Thompson, detailing many of Duncan's failures to follow standard safety procedures and his unprofessional behavior. After Delta investigated this report, it suspended Duncan without pay and benefits for thirty days. Burnfield warned Duncan that any failures to comply with Delta's operating procedures "may result in the termination of your [Duncan's] employment." Duncan did not file a grievance.

In 1997, another complaint was lodged against Duncan for unprofessional behavior. It was alleged that Duncan was rude to a passenger and flight attendant while traveling as a passenger dressed in uniform. Delta again suspended Duncan for thirty days without pay and issued to Duncan a "final warning" that "disregard of Company policies and procedures will not be tolerated in the future." Duncan asked his union to intervene, but decided not to file a grievance after being threatened with a sixty day suspension if he decided to fight the charge.

On March 21, 1998, Duncan was cited for failure to comply with Delta's safety procedures. Allegedly, Duncan began to taxi an L-1011 aircraft at LaGuardia Airport before the ground crew had moved away from the aircraft and before the ground crew gave him clearance to taxi. The incident allegedly endangered the lives of the ground crew member.

Based on this incident and Duncan's past record, Delta decided to terminate Duncan, and Chief Pilot Charles Tutt informed Duncan's union representative, Captain Richard Columbia, of that decision on approximately April 1, 1998. After discussing the matter with Duncan, Columbia requested that Delta permit Duncan to voluntarily take early retirement in lieu of being terminated. Delta agreed, and Duncan submitted his signed request for early retirement on April 8, 1998.[2] On that same day, Duncan received a letter from the FAA informing him that his application for an airman medical certificate had been denied.[3] Duncan testified he faxed this letter to his union several hours before faxing his request for early retirement to Delta.

Six months after retiring, Duncan commenced this action in a Florida court. He claimed that Delta violated the Florida Civil Rights Act of 1992. *See* Fla. Stat. Ann. § 760.01 *et seq*. (West, 1997). Duncan alleged he "was subjected to different terms, conditions and privileges of employment which caused his termination due to his age, disability and perceived disability." Delta removed the case to the United States District Court for the Southern District of Florida based on diversity jurisdiction under 28 U.S.C. § 1441. The district court set the initial discovery deadline at November 22, 1999. On December 6, 1999, the parties jointly moved to extend the discovery period until December 22, 1999. The

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2. Duncan was fifty-seven years old at the time. Mandatory retirement age for airline pilots is sixty years old.

3. The letter from the FAA does not give the reasons for denying the application. Duncan testified it was because he had high blood sugar.

district court granted that motion. Delta moved for summary judgment on January 5, 2000. In response, Duncan moved to the court to stay or deny Delta's motion for summary judgment so Duncan could take additional discovery pursuant to Federal Rule of Civil Procedure 56(f). The district court granted Delta's summary judgment motion on May 4, 2000. In granting the motion, the district court denied all pending motions as moot. Duncan appeals the district court's grant of summary judgment and its denial of his Rule 56(f) motion.

II. DISCUSSION

This court reviews a district court's decision to grant summary judgment *de novo*, "construing all evidence in the light most favorable to the non-moving party." *See Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1214 (11th Cir. 2000). "Summary judgment is only proper when there are no genuine issues of material fact." *Id.* "An issue of fact is material and genuine if a rational factfinder could find for the nonmoving party on a fact necessary to establish an element of the claim under applicable substantive law." *Ross Neely Sys., Inc. v. Occidental Fire & Cas. Co. of N.C.*, 196 F.3d 1347, 1350 (11th Cir. 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The movant bears the initial burden of showing the absence of a genuine issue as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Duncan alleged that Delta discharged him because of his age. In order to establish unlawful age discrimination under the Florida Civil Rights Act of 1992, the plaintiff must establish a *prima facie* case of discrimination. The employer

must then respond with a legitimate, nondiscriminatory reason for its actions. If the employer does produce a legitimate response, the plaintiff must establish that the employer's offered reason was a pretext to mask unlawful discrimination. *See Walker v. NationsBank of Florida N.A.*, 53 F.3d 1548, 1556 (11th Cir. 1995).[4]

In proving an age discrimination claim, the plaintiff may establish a *prima facie* case either through direct evidence of discrimination or through a variation of a four-part test for circumstantial evidence. *See Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1358 (11th Cir. 1999), *cert. denied*, __ U.S. __, 120 S.Ct. 1962 (2000). A plaintiff can satisfy the four-part *prima facie* requirement if he demonstrates: "(1) that [he] was a member of the protective group of persons between the ages of forty and seventy; (2) that [he] was subject to adverse employment action; (3) that a substantially younger person filled the position that she sought or from which [he] was discharged; and (4) that [he] was qualified to do the job for which she was rejected." *Id.* at 1359.

Duncan argues that a statement Chief Pilot Burnfield made in a memo summarizing an investigation into one of the complaints against Duncan is direct evidence of discrimination. Burnfield stated that Duncan had "a dinosaur

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4. Because the Florida Civil Rights Act is patterned after Title VII, federal caselaw dealing with Title VII claims also applies to cases construing the Florida Civil Rights Act. *See Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1387 (11th Cir.) (citing *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So.2d 1005, 1009 (Fla. 1989)), *cert. denied*, 525 U.S. 1000 (1998).

attitude of resistance to change . . . ." Burnfield explained that he was referring to Duncan's attitude, and not his age. Even if Burnfield were referring to Duncan's age, Burnfield was not Chief Pilot when Delta decided to terminate Duncan, Charles Tutt was. Burnfield, therefore was not a decision maker in Delta's decision to terminate Duncan. This Court has held that age-related statements by non-decision makers are not probative of a discriminatory intent behind a termination. *See Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1329-30 (11th Cir. 1998). Because Burnfield was not a decision maker, we do not find his comment probative of any age-related bias behind Duncan's termination.

Even if we assume, without deciding, that Duncan could establish a *prima facie* case under the four part test outlined in *Damon*, he would still have the burden to prove that Delta's offered non-discriminatory explanation was pretext to mask unlawful discrimination. *See EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1286 (11th Cir. 2000); *Walker*, 53 F.3d at 1556. Delta's non-discriminatory explanation for its decision to terminate Duncan was that his repeated failures to follow standard procedures and the incident at LaGuardia led Delta to conclude that Duncan could no longer be trusted to safely operate a Delta aircraft. Duncan offered no evidence, and the record does not disclose any evidence that Delta's explanation was pretext to mask unlawful discrimination. Because there is no genuine issue of material fact relating to the age discrimination claim, the district court correctly granted summary judgment, as Delta was entitled to judgment as a matter of law.

Appendix A

To establish a *prima facie* case under the Americans with Disabilities Act, and therefore, under the Florida Civil Rights Act of 1992,[5] a plaintiff must show: "(1) [he] has a disability; (2) [he] is a qualified individual; and (3) [he] was discriminated against because of [his] disability." *Harris v. H&W Contracting Co.*, 102 F.3d 516, 519 (11th Cir. 1997). We assume, without deciding, that Duncan's diabetes is a disability and that he is a qualified individual. Duncan's claim fails because he failed to show any facts that he was discriminated against because of his disability. The evidence contained in the record shows that Duncan found out he had diabetes on April 7 or April 8, 1998, and that he transmitted the denial of his application for an airman medical certificate to his union the same day he received it. In any event, Delta made its decision to terminate Duncan before it could have found out Duncan had diabetes. This Court has indicated that an employer cannot take an adverse action because of an employee's disability when the evidence shows the employer was not aware of the disability. *See Morisky v. Broward County*, 80 F.3d 445, 448-49 (11th Cir. 1996). Because Duncan can not show Delta knew of Duncan's alleged disability, Duncan can not show Delta discriminated against him *because of* his disability. Therefore, Duncan can not establish a *prima facie* case under the Florida Civil Rights Act and Delta is entitled to judgment as a matter of law.

"This court reviews a district court's ruling on a Rule 56(f) motion for abuse of discretion, and will not overturn such an order unless it is shown that the district court's ruling resulted in substantial harm to appellant's case." *Carmical*

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5. *See supra* note 4.

v. Bell Helicopter Textron, Inc., 117 F.3d 490, 493 (11th Cir. 1997) (footnote omitted). A district court need not wait for the completion of discovery before ruling on a motion for summary judgment, but [b]efore entering summary judgment the district court must ensure that the parties have an adequate opportunity for discovery." *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1316 (11th Cir. 1990). In making a Rule 56(f) motion, a party "must specifically demonstrate how postponement of a ruling on the motion [for summary judgment] will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Wallace v. Brownell Pontiac-GMC Co., Inc.*, 703 F.2d 525, 527 (11th Cir. 1983) (internal quotation marks omitted).

In this case, Duncan's memorandum in support of his Rule 56(f) motion stated that he needed additional time to depose witnesses, and to see if — after narrowing his request for certain crew irregularity report documents — it was necessary to go to Atlanta to inspect those documents. Duncan offered no explanation of why he needed to depose the witnesses or what the requested documents might show. Thus, Duncan failed to specifically demonstrate how a postponement of a ruling on Delta's motion and his proposed additional discovery would allow him to rebut Delta's showing of a lack of a genuine issue of material fact, and he failed to meet his burden in making a Rule 56(f) motion under *Wallace*. Furthermore, when the district court entered its scheduling order on May 11, 1999, Duncan had six months to conduct his discovery. This period was lengthened to seven months where the district court granted the parties' joint motion to extend discovery. It appears, therefore, that the

district court ensured the parties "had an adequate opportunity for discovery" before it entered its order granting Delta's motion for summary judgment. *Florida Power & Light Co.*, 893 F.2d at 1316. We do not find any abuse of discretion in the district court's decision to deny Duncan's Rule 56(f) motion.

III. CONCLUSION

Duncan failed to establish a *prima facie* case for either his age discrimination or disability-based discrimination claims. We agree with the district court's decision to grant Delta's motion for summary judgment on those claims. The district court did not abuse its discretion in denying Duncan's Rule 56(f) motion. For the foregoing reasons, we affirm the decision of the district court.

AFFIRMED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-12939

District Court Docket No.
99-06428-CV-WDF

WILLIAM DUNCAN,

Plaintiff-Appellant,

versus

DELTA AIR LINES, INC.,

Defendant-Appellee,

RICHARD COLBY,

Defendant.

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: October 25, 2000
For the Court: Thomas K. Kahn,
Clerk
By: McCombs, Elaine

APPENDIX B — ORDER ON MOTION FOR SUMMARY JUDGMENT AND FINAL SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED MAY 4, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-6428-CIV-FERGUSON

WILLIAM DUNCAN,

Plaintiff,

vs.

DELTA AIRLINES, INC. and RICHARD COLBY,

Defendants.

ORDER ON MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court on the Defendant Delta Air Lines, Inc.'s Motion for Summary Judgment [D.E.37].

Factual Background

Plaintiff William Duncan ("Duncan") was hired by Northeast Airlines as a DC-6 flight engineer on January 3, 1967. Northeast Airlines and defendant Delta Airlines Inc. ("Delta") merged in August of 1972. Duncan progressed through Delta's ranks as a pilot and was promoted to L1011 captain in 1987.

Appendix B

In October 1993 Duncan was given a disciplinary letter for "failing to appear to fly a series of trips assigned to him." He did not file a grievance. Subsequently he received a series of disciplinary reprimands for violating safety procedures and for unprofessional behavior which led to Delta's decision to terminate his employment. Those violations are set out in the following paragraphs.

In June 1994 Delta received a complaint from a first officer who reported that Duncan was not operating the aircraft in accordance with standard operating procedures. Duncan, who was represented by his union, was counseled by his chief pilot. He did not file a grievance. In February 1996 Duncan allegedly engaged in unprofessional social conduct while on a layover. As charged he became irate and caused a disruption when a round of drinks ordered by him were not served. He was again counseled and did not file a grievance. In April of the same year Delta received another complaint from a different first officer concerning Duncan's failure to abide by the employer's standard operating procedure. During a final approach the first officer "thought there was a chance of a conflict with another aircraft." After an investigation by the chief pilot, the matter was resolved by "referring it to human factors."

Just two months later, in June 1996, Delta received yet another safety procedure complaint against Duncan: failure to wear his head set; arriving late at the aircraft; operating the aircraft above the recommended altitude; deliberately flying into a thunderstorm; not setting an altimeter bug; and failing to comply with special departure profiles. Based on this last incident Delta suspended Duncan for thirty days

without pay and advised him that any further deviations from Delta's procedures, or any further findings of unprofessional behavior or violation of Delta's regulations, would result in more severe disciplinary action up to and including termination of his employment. He did not file a grievance.

Less than a year later in 1997 a complaint was lodged against Duncan for unprofessional behavior. It was alleged that Duncan was rude to a passenger and a flight attendant while traveling as a passenger dressed in uniform. Duncan was given a second thirty day suspension. He was informed that this was his final warning and that any further complaints would result in termination. Duncan testified that "I was not guilty of what they accused me of and I refused to lay down for it." He asked his union to intervene but decided not to file a grievance after being threatened with a sixty day suspension if he fought the charge.

On March 21, 1998, Duncan was again cited for failure to comply with Delta's safety procedures. Allegedly he endangered the life of the ground crew during departure from LaGuardia airport. Delta investigated the incident concluding "that plaintiff could no longer be trusted to safely operate Delta aircraft." Delta informed Duncan that he would be terminated. Instead of filing a grievance Duncan's union representative advised him to resign. An agreement was reached with the employer to forgo termination proceedings and instead allow Duncan to voluntarily retire. On April 8, 1998, Duncan's retirement forms were signed.

By a form letter from the Federal Aviation Administration ["FAA"] dated April 8, 1998, Duncan was informed that his

application for an airman medical certificate had been denied. The letter did not give a specific reason for the denial.[1] Duncan testified that the denial of his application for an airman medical certificate was faxed to the Airline Pilots Association several hours before his voluntary retirement form was sent to Delta. Duncan testified that he had no knowledge whether Delta was aware of his disability. He also testified that the results of his physical examination was not a factor in his decision to retire.

Duncan commenced this action six months after retiring, at age 58, alleging in his complaint that he was treated differently from younger and non-disabled employees and that Delta's reason for removing him from service was pretextual.

Issues

Two issues are presented: (1) whether there is an adverse employment action as an element of a cause of action for employment discrimination where an employee requests permission to and does voluntarily resign and retire with benefits as an alternative to termination; and (2) whether Delta was aware of Duncan's disability and discriminated against him on that basis.

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1. During a routine physical examination Duncan learned that he was suffering from diabetes and hypertension. In his deposition he was not certain whether the physical examination was administered on the 7th or 8th of April 1998. But he stated that he faxed the FAA letter to the Airline Pilots Association and his retirement forms to Delta on the same day.

Appendix B

Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A factual dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Similarly, a fact is "material" if it might affect the outcome of the suit under the governing substantive law, *Anderson*, 477 U.S. at 247.

In considering this motion for summary judgment, the Court must examine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that the defendant should prevail as a matter of law." *Id.* at 243. The movant bears the initial burden of showing the absence of a genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In deciding whether the movant has met this burden, the Court must view the evidence and all factual inferences in the light most favorable to the non-movant. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1532 (11th Cir. 1992). "If reasonable minds could differ on the inferences arising from undisputed facts, summary judgment should be denied." *Id.* at 1534.

Once the initial burden is met, the non-movant must come forward with specific facts showing that there is a

genuine issue for trial that precludes summary judgment. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The evidence presented cannot consist of conclusory allegations, legal conclusions or evidence which would be inadmissable at trial. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991). Likewise, "a mere scintilla of evidence supporting a position will not suffice; there must be enough of a showing that the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252. Failure to make a showing sufficient to establish the existence of any essential element of a claim is fatal and requires the entry of summary judgment. *Celotex Corp.*, 477 U.S. at 322-323.

Discussion

ADEA Claim

To establish unlawful discrimination under the Age Discrimination in Employment Act of 1967, ("ADEA"), 29 U.S.C. § 623(a), the plaintiff, initially, must establish a *prima facie* case of discrimination. The employer must then respond with a legitimate, nondiscriminatory reason for its actions. In order to prevail, the plaintiff must establish that the employer's articulated legitimate, nondiscriminatory reason was a pretext to mask unlawful discrimination. *Walker v. NationsBank of Fla. N.A.*, 53 F.3d 1548, 1556 (11th Cir. 1995).

In an ADEA case involving discharge, demotion, or failure to hire, a plaintiff may establish a *prima facie* case by showing: (1) that he was a member of the protected group

of persons between the ages of forty and seventy; (2) that he was subject to adverse employment action; (3) that a substantially younger person filled the position that he sought or from which he was discharged; and (4) that he was qualified to do the job for which he was rejected. *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (11th Cir. 1998).

First there is no *prima facie* case since there was no adverse action by the employer; Duncan voluntarily retired. Further there is no showing that a similarly situated younger pilot was treated differently.

There may be cases where an employee's resignation may be an adverse employment action, as where the employee is forced to choose between resignation and termination. That is not the case here. Duncan sought the advice of his union representative who, after examining the employer's evidence, concluded that exhaustion of grievance procedures was not in his best interests. It was by request of Duncan and his union that the employer permitted him to retire with benefits rather than proceed on its termination decision. An adverse employment action, which is an element of a *prima facie* case, was thereby averted. Even if a *prima facie* case could be presented Duncan has not shown that the reasons advanced by the employer as a basis for termination were not legitimate and discriminatory. After the series of uncontested violations which reflected on the pilot's ability to safely operate a passenger aircraft, the employer could have been found derelict in its responsibilities to the flying public by not acting to remove him from the cockpit.

Appendix B

Although Duncan's counsel, in response to Delta's summary judgment, names two younger employees who allegedly were treated differently, by deposition Duncan testified that he did not know of any younger pilots charged with the same type of violations who were treated differently. Duncan cannot by an unsworn pleading contradict his previous deposition testimony so as to raise a factual question and thereby avoid summary judgement. *See Van T. Junkins & Assoc., Inc. v. U.S. Indus. Inc.*, 736 F.2d 656, 658 (11th Cir. 1984) (holding that the District Court may find an affidavit which contradicts testimony on deposition a sham when the party merely contradicts the deposition testimony without any valid explanation).

ADA Claim

Delta contends that the ADA claim is frivolous. The Court agrees.

To establish a *prima facie* case under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C.A. § 12132, claimant must show that: (1) he has a disability, (2) he is a qualified individual, and (3) he was discriminated against because of the disability. *Morisky v. Broward County*, 80 F.3d 445, 448 (11th Cir. 1996); *Klein v. Florida Dept. of Children and Family Serv.*, 34 F. Supp.2d 1367, 1371 (S.D. Fla. 1998).

Duncan's argument that Delta, aware of his disability, discriminated against him on that basis and forced him into retirement is without a factual basis. Duncan admittedly did not communicate to Delta management his disability; Delta

decided to terminate Duncan before he took the physical and Duncan, on the advice of his union, elected voluntary retirement before failing the physical. The FAA letter denying Duncan's application for an airman medical certificate was not sent to Delta prior to the formal retirement forms. It cannot be said that the employer took an adverse action because of the employee's disability where the evidence shows that the employer was unaware of a disability. *Morisky*, 80 F.3d at 448; *Klein*, 34 F. Supp.2d at 1372.

Accordingly, it is

ORDERED AND ADJUDGED that the motion [D.E.37] is **GRANTED**.

DONE AND ORDERED in Chambers at Ft. Lauderdale, Florida, this 4th day of May, 2000.

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-6428-CIV-FERGUSON

WILLIAM DUNCAN,

Plaintiff,

vs.

DELTA AIRLINES, INC. and RICHARD COLBY,

Defendants.

FINAL SUMMARY JUDGMENT

IN ACCORDANCE with the Order granting defendant's summary judgment [D.E.37], it is

ORDERED AND ADJUDGED that final judgment is hereby entered in favor of the defendant. The plaintiff shall take nothing in this case. Any pending motions not ruled upon are rendered moot by this final summary judgment. **This case is closed.**

DONE AND ORDERED in Chambers at Ft. Lauderdale, Florida, this 4th day of May, 2000.

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE